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SUPREME COURT OF THE UNITED STATES.

..... **Term, 1940.**

No. .....

MONTE E. HART, ~~JAMES MONROE SMITH,~~ J. EMORY ADAMS, SEYMOUR WEISS and LOUIS C. LeSAGE,

versus

UNITED STATES OF AMERICA.

PETITION FOR WRIT OF CERTIORARI.

To the Honorable the Chief Justice and Associate Justices of the Supreme Court of the United States:

The petitioners, Monte E. Hart, J. Emory Adams, Seymour Weiss and Louis C. LeSage, citizens of the United States, domiciled in the State of Louisiana, respectfully bring this their application for a writ of certiorari to review the final judgment of the United States Circuit Court of Appeals for the Fifth Circuit in this criminal case.

OPINION BELOW.

The petitioners were convicted in the District Court of the United States for the Eastern District of Louisiana of violating the Mail Fraud Statute (Section 215, Criminal Code; 18 U. S. C. A., 338). They were each sentenced on September 15, 1939, as follows: Seymour Weiss and Monte Hart each to be imprisoned for 30 months and to pay fines of $1,000.00 on each of the two counts in the indictment, the prison sentences to run concurrently; and Louis C. LeSage and J. Emory Adams each to be imprisoned one year and one day and to pay fines of $500.00 on each of the two counts in the indictment, the prison sentences to run concurrently. Petitioners thereupon took their appeals to the United States Circuit Court for the Fifth Circuit, where judgment was rendered affirming their conviction on May 24, 1940 (see opinion, Tr. Vol. IV, page 1780; 112 Fed. (2d) 128). Petitioners, within the delays allowed by law, filed petitions for a rehearing in the said United States Circuit Court of Appeals for the Fifth Circuit (see Tr. Vol. IV, pages 1790 to 1828), which petitions for rehearing were denied on July 16, 1940 (Tr. Vol. IV, page 1829). That on July 19, 1940, a stay of mandate was ordered by the United States Circuit Court of Appeals for the Fifth Circuit for a period of 30 days from July 16, 1940, to enable these petitioners to apply to this Honorable Court for a writ of certiorari to review said final judgment of the United States Circuit Court of Appeals for the Fifth Circuit (Tr. Vol. IV, page 1831).

STATUTE INVOLVED.

The statute under which defendants were convicted (sec. 215, Criminal Code; Title 18, U. S. C. A. 338) reads in its pertinent provisions, as follows:

> "Whoever, having devised or intending to devise any scheme or artifice to defraud, or for obtaining money or property by means of false or fraudulent pretenses, representations, or promises, * * * shall, for the purpose of executing such scheme or artifice or attempting so to do, place, or cause to be placed, any letter, postal card, package, writing, circular, pamphlet, or advertisement, whether addressed to any person residing within or outside the United States, in any post office, or station thereof, or street or other letter box of the United States, or authorized depository for mail matter, to be sent or delivered by the post office establishment of the United States, or shall take or receive any such therefrom, whether mailed within or without the United States, or shall knowingly cause to be delivered by mail according to the direction thereon, or at the place at which it is directed to be delivered by the person to whom it is addressed, any such letter, postal card, package, writing, circular, pamphlet or advertisement, shall be fined not more than $1,000, or imprisonment not more than five years, or both." (R. S. Sec. 5480; Mar. 2, 1889, c. 393, Sec. 1, 25 Stat. 873; Mar. 4, 1909, c. 321, Sec. 215, 35 Stat. 1130.)

JURISDICTION.

Jurisdiction of this Honorable Court is invoked under paragraph (a) of Section 240 of the Judicial Code as amended (section 347, Title 28, U. S. C. A.), making it

competent for this Court to review by certiorari any case, civil or criminal, in a circuit court of appeals; and the application is made within 30 days after entry of judgment (denial of rehearing), as required by Rule XI of this Honorable Court, promulgated May 7, 1934, and in the manner required by Rule 38 of this Honorable Court.

SUMMARY STATEMENT OF MATTER INVOLVED.

The indictment charged the defendants with devising a scheme to defraud and for obtaining the sum of $75,000.00. Louisiana State University, located at the City of Baton Rouge, Louisiana, (approximately 85 miles from New Orleans) issued its check for $75,000.00, drawn on the university's account in the City National Bank, at Baton Rouge, dated October 20, 1936. The defendant Hart received the check in person at Baton Rouge, and carried it to New Orleans. There was no use of the mails whatever in the obtaining of the check, or in any detail of the transaction leading up to same claimed by the government to have been a fraudulent scheme. In the city of New Orleans, on October 28, 1936, the defendant Hart cashed the said check unconditionally over the counter of the City Branch of the Whitney National Bank, and received $75,000.00 in currency therefor. Thereafter the Whitney National Bank of New Orleans endorsed and delivered the check by messenger to the New Orleans Branch of the Federal Reserve Bank of Atlanta; the New Orleans Branch of the Federal Reserve Bank of Atlanta included it as an item in a cash letter which it mailed to the City National Bank of Baton Rouge, on which it was

drawn; the following day the City National Bank of Baton Rouge mailed to the New Orleans Branch of the Federal Reserve Bank of Atlanta an acknowledgment of receipt of the cash letter (aggregating $144,004.82, and including the item of the aforesaid $75,000.00 check of Louisiana State University). On these two mailings: (1) the cash letter from the New Orleans Branch of the Federal Reserve Bank of Atlanta to the City National Bank of Baton Rouge, and (2) the acknowledgment of same from the City National Bank of Baton Rouge to the New Orleans Branch of the Federal Reserve Bank of Atlanta, the two counts of the indictment were predicated.

QUESTIONS PRESENTED.

On these two mailings by, respectively, the New Orleans Branch of the Federal Reserve Bank of Atlanta and the City National Bank of Baton Rouge, the District Attorney founded an indictment charging that the defendants had devised a scheme to defraud and in execution of said scheme had used the mails. Realizing that it was necessary under the law that the defendants, if they caused the use of the mails, must necessarily act by the hand of an agent, even though an innocent agent, the District Attorney charged in the indictment (Tr., Vol. I, page 8):

> "That on the 28th day of October, 1936, the City Branch of the Whitney National Bank *as agent for the defendants* herein transmitted said check to the main office of the Whitney National Bank in New Orleans, which, *as agent for the defendants herein,* in accordance with its usual custom cleared the said

> check through the Federal Reserve Bank at New Orleans, Louisiana, which in turn as agent of the said City Branch of the Whitney National Bank *and of the defendants herein,* and in order to effect payment of said check forwarded the said check on the 28th day of October, 1936, to the City National Bank in Baton Rouge, Louisiana, by depositing same in an authorized depository for mail matter to be sent or delivered by the post office establishment of the United States (italics ours)."

However, it became apparent by the time the trial took place that since the $75,000.00 check had been cashed in New Orleans, and thereby had been sold to and became, as a negotiable instrument, the absolute property of the Whitney National Bank of New Orleans, the Federal Reserve Branch and the City National Bank of Baton Rouge could not have acted as agents (as thus charged in the indictment) of the defendants in the two mailings complained of. Hence the Judge told the jury in his charge (Tr., Vol. II, bottom of page 1010):

> "Having in mind what I have just said to you with reference to the $75,000.00 check you may desire to be informed as to the legal situation with reference to the charge that the New Orleans bank acted as the defendants' agent for the collection of this check. The evidence bearing on this question shows that the check was cashed by Hart and that same was indorsed by him and F. E. Ames unrestrictedly. If you find this to be a fact and I assume you will, because the contrary is not asserted, you are instructed that the City Bank Branch of the Whitney Bank of New Orleans thereby became the owner of said check and consequently said bank could not in the strict legal sense have acted as defendants' agent in the collect-

> ing of their own check. You are therefore instructed to treat this charge of agency as surplusage."

But inasmuch as every judicial acceptance of the doctrine of "causation" has heretofore been founded on the legal principle of "agency", the Judge was sore pressed to reconcile his treatment of the indictment charge of agency as surplusage with what he had to say to the jury on "causation". What he did, as we hereafter show in our supporting brief, was to change the commonly accepted language of the rule as laid down in a leading case, so as to say to the jury in the case at bar that "agency" was not necessary to "causation". This is the language of the Judge in his charge to the jury on this point which is complained of (Tr., Vol. II, top of page 1010):

> "With reference to this question of causation you are instructed that it is *not essential* to the commission of the offense that the check, letter or writing be deposited in the mail by the defendant himself *or by an agent* or another acting under his express direction, because he is equally responsible if it be deposited therein as a natural and probable consequence of an act intentionally done by him with knowledge at the time that such will be its natural and probable effect. (Italics ours.)"

To summarize the question presented, it was our contention throughout the case that there was no use of the mails by the defendants in the $75,000.00 transaction, and the two bank mailings referred to were improperly resorted to by the government to stretch the mail fraud statute over the subject-matter and obtain federal court jurisdiction; that after the trial judge contradicted the

terms of the indictment itself by telling the jurors that the federal reserve branch and the Baton Rouge bank could not have been the agents of the defendants in the mailings, he left the jury no other possible agents in the case through whom the defendants could have been found to have acted, so, in order to prevent an acquittal on this issue, he gave the jurors the improper and erroneous instruction that "causation" could take place in the absence of an agent. Such erroneous instruction destroyed the right of the defendants to have the jurors clearly told that when the Whitney National Bank purchased the check it became the absolute owner of same and whatever was done thereafter was for the account of and in the interest of the Whitney National Bank, and that without the existence of an agency on behalf of the defendants (even an innocent one) they could not legally "cause" the use of the mails.

The United States Circuit Court of Appeals for the Fifth Circuit, by its treatment of the issue, added a further question to the case. Its decision held in effect that the defendants "caused" the mailings up to the point when the Baton Rouge bank paid the $75,000.00 out of the Louisiana State University bank account. Such theory would have held the defendants liable under Count 1 of the indictment, relating to the mailing of the cash letter from the federal reserve branch in New Orleans to the Baton Rouge bank. But it could not have also embraced the subsequent acknowledgment of the cash letter by the Baton Rouge bank *after it paid the check,* which is the the basis of Count 2. Under its own reasoning, the Circuit Court of Appeals should have reversed the conviction of defendants and the sentences imposed under Count 2.

REASONS RELIED ON FOR ALLOWANCE OF WRIT.

The reasons relied on for the allowance of a writ of certiorari are:

1. That the constitutional and statutory rights of the petitioners have been infringed by conviction for using, or causing the mails to be used in furtherance of a scheme to defraud, when none of the defendants used the mails themselves, and no agent or agency of the defendants used the mails in furtherance of the alleged scheme, and when the mails were not used by the defendants, their agents, or by any one else until after the money charged to be the object of the fraud had been received and collected by the defendants.

2. That the constitutional and statutory rights of the petitioners have been infringed by conviction for using or causing the mails to be used in furtherance of a scheme to defraud, when the trial court charged the jury that the petitioners could be held criminally responsible for a mailing under the theory of "causation", and that the petitioners could be criminally responsible for such mailing even where they did no mailing themselves or by means of or through any agent, and when there was a mailing by a person admittedly not an agent of the petitioners and in no way connected with them.

3. That the constitutional and statutory rights of the petitioners have been infringed by conviction for using or causing the mails to be used in furtherance of a scheme to defraud when the indictment charged that the mails were used by certain named banks as agents of the peti-

tioners, and the trial court instructed the jury that this allegation in the indictment charging petitioners with using the mails in furtherance of a scheme to defraud through named agents, was surplusage, and that they did not act through the persons named as agents in the indictment, and that the persons named in the indictment were not and could not have been the agents of the petitioners.

4. That the constitutional and statutory rights of petitioners have been infringed by a conviction for using or causing the mails to be used in furtherance of a scheme to defraud, where the petitioners, upon the trial of the case, requested the trial court to charge the jury that the government must prove, beyond a reasonable doubt, that the accused had used, or caused the mails to be used in the furtherance of a scheme to defraud through certain agents named in the indictment, which special charge the trial court refused to give, but on the contrary charged the jury that such part of the indictment alleging that petitioners had used the mails through named agents was surplusage and could be entirely disregarded by the jury.

5. That the constitutional and statutory rights of the petitioners have been infringed by a conviction for using or causing the mails to be used in furtherance of a scheme to defraud, as a result of the affirmation of the entire verdict and sentence of the trial court by the Circuit Court of Appeals for the Fifth Circuit, when said Circuit Court of Appeals found in its own opinion that the offense had been completed before the letter, made the basis of the second count, had been mailed, but did not set the conviction under the second count aside.

TRANSCRIPT ANNEXED.

The record having been printed for the use of the court below (Rule 38, paragraph 7), and the necessary copies so printed being furnished, your petitioners now file herewith ten copies of the record as printed below, together with the proceedings and opinion in the Honorable Circuit Court of Appeals for the Fifth Circuit, and due certificate thereon of the Clerk of said Court.

SUPPORTING BRIEF.

Petitioners also file herewith and make part of this application their brief in support hereof.

PRAYER.

Wherefore, petitioners respectfully pray that a writ of certiorari may issue to the Honorable the United States Circuit Court of Appeals for the Fifth Circuit, to the end that this cause may be reviewed and determined by this Court; and that the judgment of the said United States Circuit Court of Appeals for the Fifth Circuit may be in due course reversed and set aside, and that judgment may be rendered in favor of petitioners, setting aside their conviction and sentences pronounced below, and discharging them forthwith; and petitioners pray for all further and necessary orders proper in the premises, and for all such relief as the nature of the case may justify.

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